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IN THE

Supreme Court of the United States

BILL LOCKYER, Attorney General of the State of California;
ERNST B. ROE, Warden,

Petitioners,

vs.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION; HONORABLE BILL JONES, SECRETARY OF STATE OF CALIFORNIA; CALIFORNIA STATE SENATORS DICK ACKERMAN, JIM BATTIN, JIM BRULTE, RAY HAYNES, ROSS JOHNSON, BRUCE McPHERSON, DICK MONTIETH; AND CALIFORNIA STATE ASSEMBLYMAN DENNIS HOLLINGSWORTH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. What, if any, law is "clearly established" by Supreme Court precedent with respect to Eighth Amendment challenges to the proportionality of prison sentences?

2. Was the state court's application of the relevant body of law to the defendant's challenge to his sentence so arbitrary as to exist outside the universe of plausible outcomes and therefore unreasonable under 28 U. S. C. § 2254(d)?

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BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's attack on California's "three strikes" law is an unwarranted expansion of habeas review which cripples an important recidivist sentencing scheme, and is thus

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

contrary to the interest of victims and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The prisoner, Leandro Andrade, was convicted in a California court of two counts of petty theft. Cal. Penal Code §§ 484, 487. See *Andrade* v. *Roe*, 270 F. 3d 743, 749 (CA9 2001). Petty theft is a misdemeanor, see Cal. Penal Code § 490, but if the defendant was previously convicted of and served a term for burglary or other specified crimes, then the theft may be treated as either a misdemeanor or a felony. See Cal. Penal Code § 666. Because the prisoner had three prior residential burglary convictions, his thefts were enhanced to felonies. See *Andrade*, *supra*, at 749. Andrade also had prior convictions for misdemeanor theft in 1982, a federal felony transportation of marijuana offense in 1988, a state petty theft offense in 1990, and a 1991 parole violation for escape from federal prison. *Id.*, at 748-749. California law classifies residential burglary as a serious felony, see Cal. Penal Code § 1192.7(c)(18), making Andrade subject to California's "three strikes" law. See Cal. Penal Code § 1170.12(b)(1). Under the three strikes statute, Andrade received two consecutive 25-years-to-life sentences for his two felony theft convictions. See *Andrade*, *supra*, at 749.

A California Court of Appeal affirmed Andrade's conviction, rejecting an Eighth Amendment attack on his sentence in an unpublished opinion issued on May 13, 1997. App. to Pet. for Cert. 69. Relying on the California precedent, the Court of Appeal applied a three-part test that is almost identical to the test utilized in *Solem* v. *Helm*, 463 U. S. 277 (1983). Compare App. to Pet. for Cert. 77, with *Solem*, *supra*, at 292. The California Supreme Court denied the prisoner's petition for review on July 23, 1997. App. to Pet. for Cert. 81. Andrade filed a *pro se* habeas petition in the federal District Court for the Central District of California attacking his sentence on Eighth

Amendment grounds. The District Court denied the petition and subsequently denied Andrade a certificate of appealability. See *id.*, at 67.

The Ninth Circuit Court of Appeals granted Andrade a certificate of appealability and appointed counsel. See *Andrade*, 270 F. 3d, at 750. The Court of Appeals reversed the District Court, finding that Andrade's sentence was disproportionate to his crime in violation of the Eighth Amendment, and that the California Court of Appeal's decision disregarded the three-part test of *Solem*, *supra*, making it an unreasonable application of Supreme Court precedent and therefore not subject to the deferential review standards of 28 U. S. C. § 2254(d)(1). See *id.*, at 766-767. This Court granted California's certiorari petition on April 1, 2002.

SUMMARY OF ARGUMENT

Federal courts should address the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") issues before assessing the correctness of the state court decision. This Court has implicitly followed this practice in *Penry* v. *Johnson*, 532 U. S. 782 (2001) and *Bell* v. *Cone*, 535 U. S. __ (No. 01-400, May 28, 2002). This Court should now make its practice an express rule.

The present case differs from the Court's prior AEDPA cases because there are few clearly established principles in the unsettled body of law governing Eighth Amendment attacks on prison sentences. While the relevant decisions generally establish a deferential standard for reviewing sentences, there is a continuing conflict between two of the leading precedents in this area, *Rummel* v. *Estelle*, 445 U. S. 263 (1980) and *Solem* v. *Helm*, 463 U. S. 277 (1983). *Rummel* established a very deferential standard for reviewing proportionality claims against prison sentences. Although it indicated that some extraordinarily harsh sentences may not pass constitutional muster, such cases were necessarily rare.

Although *Solem* proclaimed to be similarly deferential, the execution of that standard differed significantly from *Rummel*. The second and third parts of its three-part proportionality test cannot be reconciled with *Rummel*. The *Solem* Court also demonstrated a willingness to draw conclusions based upon sentencing philosophy that was anathema to the deference to legislative policy decisions in *Rummel*.

Harmelin v. *Michigan*, 501 U. S. 957 (1991) did not end the confusion. As a split opinion, it is a weak candidate for clarifying the law, although Justice Kennedy's narrower concurrence can be seen as the controlling precedent. That opinion does not conclusively resolve the conflict between *Solem* and *Rummel*, but does move the law more towards *Rummel*'s broadly deferential standard. It does not attempt to provide adequate guidance for how to determine when a sentence is disproportionate because this area of the law is not amenable to such standards.

The treatment of proportionality challenges in other jurisdictions reflects the unsettled state of the law, as many state and federal courts decry the lack of standards in this field. Since *Harmelin*, some courts now claim that *Solem* has been overruled, and many more claim that it has been weakened. Under these circumstances, there is broad room for reasonable disagreement.

The state court did not fail to apply the proper precedent. It applied a California constitutional standard that is the equivalent of *Solem*'s three-part test. Since Andrade's sentence is less severe and his culpability greater than the defendant in *Solem*, his case is not materially indistinguishable from *Solem*. Therefore, the state court satisfied the clearly established portion of 28 U. S. C. § 2254(d).

The California court's rejection of Andrade's proportionality claim was a reasonable application of the little clearly established law there is in this area. The Ninth Circuit applied a clear error standard to assess the reasonableness of the state

court decision. A better approach is to focus on finding reasons to support the state court decision, rather than assessing its alleged error. The decision to uphold Andrade's sentence is reasonable under this approach.

If this Court decides that the three strikes law is unconstitutional in *Ewing* v. *California*, No. 01-6978, the rejection of Andrade's federal habeas claim will not prevent him from getting relief in the California courts. California allows successive habeas petitions to raise claims made retroactive to final judgments. Since Andrade's claim would be retroactive under the first exception to *Teague* v. *Lane*, 489 U. S. 288 (1989) and under California's more generous retroactivity rule, he would be able to have his day in court.

ARGUMENT

I. The AEDPA issue should be resolved first, as a "threshold matter."

Ninth Circuit precedent takes a backwards approach to federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Van Tran* v. *Lindsey*, 212 F. 3d 1143 (CA9 2000), held that a federal habeas court should "first determine whether the state court's decision was erroneous prior to considering whether it was contrary to or involved an unreasonable application of the law under the AEDPA . . . ." *Id.*, at 1155.

Amicus CJLF has previously argued that the AEDPA issue should be addressed first, and adopts those arguments in this case. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Cone*, No. 01-400, pp. 8-14; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Penry* v. *Johnson*, No. 00-6677, pp. 3-9.[2] This Court addresses the AEDPA issues first in its habeas cases. In *Penry* v. *Johnson*,

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2. These briefs are available on our Web site, www.cjlf.org/briefs/briefmain.htm.

532 U. S. 782 (2001), this Court declined to decide "the merits of Penry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent." *Id.*, at 794-795. In *Bell* v. *Cone*, 535 U. S. __ (No. 01-400, May 28, 2002), this Court again determined that the state court decision was "reasonable" without deciding whether it was correct. See *id.* (slip op., at 12, 14-15). What is implicit in *Penry* and *Bell* should be made explicit. As soon as a court determines that the moving party is not entitled to the relief he seeks, the court can and should stop, both for efficiency and to avoid rendering advisory opinions. Cf. *Teague* v. *Lane*, 489 U. S. 288, 316 (1989) (plurality opinion).

When confronted with the murky area of disproportionality challenges to prison sentences, the California Court of Appeal recognized the few clearly established legal principles in this field and applied them reasonably. The inquiry should begin and end there. The Ninth Circuit's attempt to edify the California courts was unnecessary and deflected it from the proper analytical path.

II. The California court correctly identified and applied the few clearly established principles in an unsettled body of law.

In this Court's previous applications of the "clearly established" portion of 28 U. S. C. § 2254(d), identification of the controlling precedent was straightforward. In *Williams* v. *Taylor*, 529 U. S. 362 (2000), the landmark decision of *Strickland* v. *Washington*, 466 U. S. 668 (1984) was easily identifiable as the relevant, clearly established Supreme Court precedent. See *Williams*, *supra*, at 390-391; *id.*, at 413-414 (O'Connor, J., concurring). In *Penry* v. *Johnson*, 532 U. S. 782 (2001), analysis of Penry's Fifth Amendment claim centered on whether *Estelle* v. *Smith*, 451 U. S. 454 (1981) could be distinguished, see *Penry*, *supra*, at 793-795, while his Eighth

Amendment claim centered on Texas' compliance with the first *Penry* case, *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). See *Penry* v. *Johnson*, 532 U. S., at 786.

This case raises difficult issues regarding what is clearly established under § 2254(d). An examination of this Court's cases governing the proportionality of prison sentences under the Eighth Amendment uncovers a body of law that is considerably less settled than those that confronted the *Williams* and *Penry* courts. Under these difficult circumstances, the California Court of Appeal cannot be said to be contrary to the clearly established Supreme Court precedent that is in this field.

A. The Unsettled Law.

An understanding of the unsettled body of law governing Eighth Amendment attacks on the proportionality of prison sentences requires a brief survey of the cases in this field. Some assert that precedent for an Eighth Amendment proportionality requirement traces back to *Weems* v. *United States*, 217 U. S. 349 (1910). See *Harmelin* v. *Michigan*, 501 U. S. 957, 1012 (1991) (White, J., dissenting). Although historically interesting, *Weems*' unusual set of facts seriously limits its relevance to modern prison sentences. The relevant precedent is much more recent, a quartet of cases beginning with *Rummel* v. *Estelle*, 445 U. S. 263 (1980).

1. Rummel.

Rummel addressed a life sentence for a comparatively minor theft under Texas' recidivist scheme. See *id.*, at 264-265. In upholding the sentence, this Court established that while prison sentences might be subject to Eighth Amendment proportionality review, the standard of review was very deferential. It noted that "[t]his Court has on occasion stated that the Eighth Amendment prohibits its imposition of a sentence that is grossly disproportionate to the severity of the crime." *Id.*, at 271. The largest source of such precedent came from capital cases, which were readily distinguished "[b]ecause a sentence

of death differs in kind from any sentence of imprisonment . . . ." Noncapital cases raising successful proportionality claims were "exceedingly rare." *Ibid.* *Weems*, the most notable example, was limited to its "peculiar facts," including the harsh and alien *cadena temporal*. See *id.*, at 274. The *Rummel* Court concluded that "one could argue, without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." *Ibid.*

This Court recognized a narrow exception to its deferential rule. "This is not to say that a proportionality principle does not come into play in the extreme example mentioned by the dissent, *post*, at 288, if a legislature made overtime parking a felony punishable by life imprisonment." *Id.*, at 274, n. 11. It addressed proportionality in such narrow terms because

> "a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view expressed in *Coker* [v. *Georgia*, 433 U. S. 584 (1977)] that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." *Id.*, at 275.

Rummel was convicted of obtaining $120.75 by false pretenses, a felony. See *id.*, at 266. He also had prior felony convictions for $80 in credit card fraud and forging a $28.36 check. See *id.*, at 265. Under Texas law the two prior felony convictions elevated Rummel's sentence to life. See *id.*, at 264. The Court dismissed Rummel's attempt to use the small amounts stolen and his lack of violence as objective examples of disproportionality. It held that drawing such distinctions "are indeed 'subjective' and therefore properly within the province of legislatures, not courts." *Id.*, at 275-276. Other attempts by Rummel to distinguish his case from this Court's nearly total deference to sentencing statutes were similarly unsuccessful. See *id.*, at 280-282. Therefore, Texas' mandatory life sentence for Rummel's minor theft was upheld. See *id.*, at 285.

2. Hutto.

Hutto v. *Davis*, 454 U. S. 370 (1982) (*per curiam*) reinforced *Rummel*'s deference to the legislative prerogative to define crimes and set punishments. The Court addressed a Fourth Circuit decision holding that a 40-year sentence for possession of less than nine ounces of marijuana was cruel and unusual punishment. See *id.*, at 371. The Fourth Circuit was reversed in unusually harsh language.

> "[T]he Court of Appeals sanctioned an intrusion into the basic linedrawing process that is 'properly within the province of legislatures, not courts.' More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. . . . But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Id.*, at 374-375 (citation omitted) (quoting *Rummel*, 445 U. S., at 275-276).

In other words, this Court meant what it said in *Rummel*. A proportionality challenge to a prison sentence was next to impossible. Barring the extreme example of life for overtime parking, see *Rummel*, 445 U. S., at 274, n. 11, prison sentences were likely to survive an Eighth Amendment attack.

3. Solem.

Solem v. *Helm*, 463 U. S. 277 (1983) addressed whether life without the possibility of parole was an unconstitutionally disproportionate punishment for Helm's seventh nonviolent felony conviction. See *id.*, at 279. Helm's prior felony convictions were three third-degree burglaries, theft by false

pretenses, grand larceny, and third-offense driving under the influence. See *id.*, at 279-280. His current conviction was for "uttering a 'no account' check for $100." *Id.*, at 281. The *Solem* Court began its analysis with the history of the prohibition against cruel and unusual punishment. It found that a proportionality requirement was "deeply rooted and frequently repeated in common-law jurisprudence." *Id.*, at 284. Proportionality had been recognized "in this Court for almost a century." *Id.*, at 286. Therefore it rejected the state's contention that proportionality did not apply to felony prison sentences. *Id.*, at 289. While courts must be deferential to legislative sentencing policies, "no penalty is *per se* constitutional." *Id.*, at 290.

Solem took an objective approach to proportionality review. It applied a three-part test, examining "i) the gravity of the offense and the harshness of the penalty; ii) the sentences imposed on other criminals in the same jurisdiction; and iii) the sentences imposed for the commission of the same crime in other jurisdictions." *Id.*, at 292. Applying this test the *Solem* Court found that Helm's sentence violated the Eighth Amendment's proportionality requirement. See *id.*, at 303.

Its holding that this punishment violated the Eighth Amendment is difficult to square with *Rummel* and *Hutto*. It is true that the facts of *Solem* do differ from *Rummel*. *Solem* involved a potentially harsher punishment, as the life sentence in *Rummel* was mitigated by the possibility of parole within 12 years. See *id.*, at 297. Yet this would seem to have made little difference to the *Rummel* Court. The *Rummel* decision accorded nearly complete deference to prison sentences. See, *ante*, at 8. While the *Rummel* Court did note the "however slim" possibility of parole in 12 years, see 445 U. S., at 280-281, its holding did not turn on this point. *Rummel*'s discussion of the possibility of parole was a small part of a larger analysis dealing with Rummel's claim that no state would have punished him as severely as Texas. See *id.*, at 279-281. The fact that the possibility of parole ameliorated Rummel's sentence did not

support the argument's dismissal. Instead, it showed that Rummel's claim involved making subtle distinctions between gradations of crime and punishment that courts must not make. "We offer these additional considerations not as inherent flaws in Rummel's suggested interjurisdictional analysis but as illustrations of the complexities confronting any court that would attempt such a comparison." *Id.*, at 281.

Solem also contradicted the spirit of *Rummel*. Instead of *Rummel*'s declaration that prison sentences could be attacked only in the most extreme cases, the *Solem* Court warned that all sentences were subject to scrutiny. Thus, even "a single day in prison may be unconstitutional in some circumstances." *Solem*, 463 U. S., at 290. *Solem*'s three-part test is also contrary to *Rummel*. *Solem*'s first part, comparing the gravity of the offense to the severity of the penalty, see *id.*, at 290-291, was calculated differently in *Rummel*. The only sentence it explicitly recognized as disproportionate was the extreme circumstance of life for a parking offense. This conflict was made more prominent by *Solem*'s application of this standard. The Court minimized the gravity of Helm's offenses because they were not violent and involved small sums, an analysis that the *Rummel* Court flatly rejected as inherently subjective. Compare *Solem*, *supra*, at 296-297, with *Rummel*, 445 U. S., at 275-276.

The second *Solem* factor, comparison to sentences imposed on other criminals in the jurisdiction, see 463 U. S. at 291, was dismissed by *Rummel* in a footnote. See 445 U. S., at 282, n. 27. *Rummel* also thoroughly dismissed *Solem*'s third factor, comparing the sentences to sentences for similarly situated criminals in other jurisdictions. Compare *Solem*, *supra*, at 291, with *Rummel*, *supra*, at 281-282. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, *supra*, at 282.

The two decisions even disagreed on the relevance of sentencing philosophy to proportionality claims. While the

Solem Court attacked the North Dakota sentence for precluding any efforts to rehabilitate Helm, see 463 U. S., at 297, n. 22, the *Rummel* Court refused to adopt any theory of sentencing. See 445 U. S., at 283-284.

In spite of this conflict, *Solem* disclaimed any intent to overrule *Rummel*. See 463 U. S., at 303, n. 32. The *Solem* Court showed at least some affinity for *Rummel*'s analysis by reiterating that successful proportionality challenges to noncapital sentences should be " 'exceedingly rare.' " *Id.*, at 289 (quoting *Rummel*, 445 U. S., at 272). Similarly, the *Solem* Court also denied that it was creating any general authority for appellate review of sentences. Courts should still accord "substantial deference" to "legislatures and sentencing courts . . . ." *Solem*, 463 U. S., at 290, n. 16. It asserted that it merely supplied standards for reviewing Eighth Amendment proportionality claims that were absent from *Rummel*. See *id.*, at 304, n. 32. Since Helm's crimes were nonviolent and minor, and his sentence was comparatively harsh to similarly situated criminals in North Dakota and other states, his sentence was struck down for being "significantly disproportionate to his crime . . . ." *Id.*, at 303.

4. Harmelin.

The tensions underlying Eighth Amendment proportionality review of prison sentences exploded into full view in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). Harmelin was sentenced to life without the possibility of parole for possessing 672 grams of cocaine. See *id.*, at 961 (opinion of Scalia, J.). Except for rejecting an individualized sentencing requirement for noncapital sentences and upholding Harmelin's sentence, see *id.*, at 996 (majority), there was no majority opinion in this 5-4 decision.

Justice Scalia, joined by the Chief Justice, rejected Eighth Amendment proportionality review except in capital cases. See *id.*, at 994. The opinion denounced *Solem* as simply wrong and "scarcely the expression of clear and well accepted constitutional law." See *id.*, at 965. *Rummel* and *Hutto* were cited

approvingly in Justice Scalia's opinion although both cases accepted the possibility of a noncapital proportionality guarantee. See *id.*, at 962-964. Harmelin's sentence was necessarily lawful under this approach. See *id.*, at 996.

Justice Kennedy, joined by Justice O'Connor and Justice Souter, agreed that Harmelin's sentence should be upheld, but that *stare decisis* counseled against rejecting "the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years." *Id.*, at 996 (opinion of Kennedy, J.). However, this opinion recognized that it was upholding a fractured line of authority. "Although our proportionality decisions have not been clear or consistent in all respects, they can be reconciled, and they require us to uphold petitioner's sentence." *Id.*, at 996-997. After briefly surveying the Eighth Amendment proportionality cases since *Weems*, see *id.*, at 997-998, Justice Kennedy found fault with the current state of proportionality analysis in noncapital cases. "Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types." *Id.*, at 998. Thus *Solem* "appeared to apply a different analysis than in *Rummel* and *Davis*" even though it purported to uphold those decisions. *Ibid.* What could be harvested from these conflicting authorities was "some common principles that give content to the uses and limits of proportionality review." *Ibid.*

These principles are very general, and lean more towards *Rummel* than *Solem*. First, "the fixing of prison terms for specific crimes involves a substantive peneological judgment that as a general matter is 'properly within the province of legislatures, not courts.' " *Ibid.* (quoting *Rummel*, 445 U. S., at 275-276). Determining the proper punishment involves difficult policy questions containing strong political and moral elements. See *ibid.* Appellate courts should not make such distinctions. This was the central theme of *Rummel*, that the

appellate courts should not second-guess these policy decisions. See *Rummel*, 445 U. S., at 279.

"The second principle is that the Eighth Amendment does not mandate adoption of any peneological theory." *Harmelin*, 501 U. S., at 999 (opinion of Kennedy, J.). Once again, this is closest to *Rummel*'s reasoning. As noted earlier, while the *Rummel* decision deferred to the peneological theories supporting Texas' recidivism statute, the *Solem* Court criticized the life without possibility of parole sentence as foreclosing any attempts at Helm's rehabilitation. See *ante*, at 10. For the third principle, that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure," Justice Kennedy's opinion cited *Solem*. See *ibid.* This principle is also closer to *Rummel* than *Solem*. The *Rummel* Court strongly criticized interjurisdiction comparison of sentences, see *Rummel*, 445 U. S., at 281; *Harmelin*, *supra*, at 999-1000 (opinion of Kennedy, J.), and was willing to uphold a penalty even if it was the most severe in the nation for that crime. See *Rummel*, at 209-282. While the *Solem* decision acknowledged difficulties in making such comparisons, see 463 U. S., at 294-295; *Harmelin*, *supra*, at 1000 (opinion of Kennedy, J.), it still made interjurisdictional comparison a mandatory part of its three-part test. See *Solem*, *supra*, at 291-292.

The fourth principle, that proportionality review should be driven by objective factors, is derived from both *Solem* and *Rummel*. See *Harmelin*, 501 U. S., at 1000 (opinion of Kennedy, J.). The deference in *Rummel* was driven by the need to avoid substituting subjective judicial sentiments for legislative policy choices. See *Rummel*, 445 U. S., at 275. In *Solem*, the quest for objectivity led to its three-part test. See 463 U. S., at 290-291. Justice Kennedy's opinion also recognized that "we lack clear objective standards to distinguish between sentences for different terms of years" making successful proportionality challenges to prison sentences " ' "exceedingly rare." ' "

Harmelin, *supra*, at 1001 (quoting *Solem*, *supra*, at 290 (quoting *Rummel*, *supra*, at 272)).

The remaining important feature of the concurrence was the decision to forego the last two parts of the *Solem* test. *Solem* was now "understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review." *Id.*, at 1004-1005. Thus, the last two *Solem* factors would only be referred to when "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.*, at 1005.

Harmelin is a clear step back from *Solem*. Two justices voted to overrule it, while the remaining members of the majority would all but abandon two-thirds of its test. Justice Kennedy's opinion asserted it "neither 'eviscerate[s]' *Solem*, nor 'abandon[s]' its second and third factors . . . ." *Id.*, at 1005 (quoting *id.*, at 1018, 1020 (White, J., dissenting)). It did, however, represent a revival of *Rummel* and *Hutto*. See *id.*, at 1005 (opinion of Kennedy, J.) ("full account"). Given the conflict between *Solem* and *Rummel*, any return to *Rummel* is necessarily a step back from *Solem*.

This is the body of precedent that confronted the California appellate court when it addressed Andrade's Eighth Amendment claim: conflicting decisions providing comparatively little concrete guidance outside of a strong deference to noncapital sentences, and this Court stepping back from the only explicit test it had promulgated. The question is not simply whether the California court correctly identified and applied clearly established law, but rather whether there was any *clearly* established law for the court to apply?

B. Searching for Clarity.

Any attempt to find a clearly established precedent for the California court to follow begins in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). In addition to being the last word on the subject, *Harmelin* reflects the fissures and uncertainty running

through the Eighth Amendment's proportionality requirement for noncapital sentences. As a split opinion in an already conflicted body of precedent, *Harmelin* is not a strong candidate for clearly establishing any precedent. However, a handful of principles can be refined from the *Harmelin* opinion. In a fragmented opinion, the holding is taken from the opinion concurring on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Since Justice Kennedy's concurrence did not call for overruling any of this Court's precedents, it is the narrower of the two *Harmelin* concurrences, and therefore is *Harmelin*'s holding.

Harmelin does stand for more than deference to noncapital sentences. The reiteration of the principle that sentences must be analyzed by objective factors, see *Harmelin*, 501 U. S., at 1000 (opinion of Kennedy, J.), is not expressly deferential. But see *Rummel*, 445 U. S., at 275(extensive judicial intrusion into legislative punishment decisions threatens objectivity principle). However, the objectivity principle provides limited guidance. Justice Kennedy's concurrence reiterates the difficulty of finding any objective factors for analyzing the constitutionality of prison sentences. See *Harmelin*, *supra*, at 1001 (opinion of Kennedy, J.). Once again, this supports deferring to the constitutionality of prison sentences. The "relative lack of objective standards" makes successful Eighth Amendment attacks on prison sentences " ' "exceedingly rare." ' " *Ibid.* (quoting *Solem*, 463 U. S., at 290 (quoting *Rummel*, *supra*, at 272)).

The final principle, that the Eighth Amendment only forbids " 'grossly disproportionate' " sentences, see *ibid.* (quoting *Solem*, 463 U. S., at 288), is the culmination of the deference that is the central theme of *Harmelin*. This drove the final principle of Justice Kennedy's *Harmelin* concurrence, dispensing with *Solem*'s comparative analysis absent an inference of gross disproportionality. See *id.*, at 1005. Like the rest of Justice Kennedy's opinion, this principle is most likely to be violated by a court improperly striking down a sentence.

While Justice Kennedy's opinion instructed reviewing courts to defer to all but the grossly disproportionate sentences, it understandably provides little real guidance on how to determine when a prison sentence raises such an inference. The law is unclear in this area because there are comparatively few proportionality cases, and they address "sentences of different types." See *id.*, at 998. The analysis of Harmelin's sentence of life without possibility of parole a first-time drug offense has minimal relevance for Andrade's two consecutive 25-years-to-life sentences under a recidivist sentencing statute. This lack of ready standards means that the scope of reasonable disagreement is necessarily very broad. Therefore very few applications of these precedents can be classified as "unreasonable."

Although *Solem* and *Rummel* present closer facts, their guidance is limited. A final principle of Justice Kennedy's *Harmelin* concurrence is that the law governing Eighth Amendment attacks on prison sentences is unclear and conflicted. See *ibid.* This opinion did not resolve the conflict between *Solem* and *Rummel*, see part I A 3, *ante*, that afflicts this part of the law. The common principles it drew from these cases boil down to instruction to the appellate courts to defer to most prison sentences presented to them. While *stare decisis* kept it from accepting Justice Scalia's invitation to overrule *Solem*, see *id.*, at 996, Justice Kennedy's concurrence does represent a significant move away from *Solem* towards *Rummel*. See part I A 4, *ante*. Contrary to the Ninth Circuit's assertion, see *Andrade* v. *Roe*, 270 F. 3d 743, 766-767 (CA9 2001), *Solem* does not compel the result in this case because its exact strength as precedent is uncertain. While *Solem* may have survived *Harmelin*, it has been diminished. Precisely how diminished is not yet known.

The confused state of the law after *Harmelin* is reflected by the reaction of the state and federal courts. Many decisions in the state and lower federal courts comment on the uncertain state of the law since *Harmelin*. See, *e.g.*, *United States* v. *Sarbello*, 985 F. 2d 716, 723 (CA3 1994) ("lack of clear

directive from the Supreme Court"); *Neal* v. *Grammer*, 975 F. 2d 463, 465 (CA8 1992) ("the future of the proportionality test is uncertain"); *Hawkins* v. *Hargett*, 200 F. 3d 1279, 1281 (CA10 1999) (*Harmelin* "fractured" leaving the meaning of *Solem* "less than clear"); *McCollough* v. *Singletary*, 967 F. 2d 530, 535 (CA11 1992) (viability of *Solem* called into doubt by *Harmelin*); *State* v. *Brown*, 825 P. 2d 482, 490-491 (Idaho 1992) (*Harmelin* "fractured"); *People* v. *Gibson*, 90 Cal. App. 4th 371, 387, 108 Cal. Rptr. 2d 809, 820 (2001) (continued existence of proportionality review questionable after *Harmelin*); *State* v. *Oliver*, 745 A. 2d 1165, 1169 (NJ 2000) ("we have generally avoided entering the debate among the several members of the Supreme Court concerning the Eighth Amendment's proscription against cruel and unusual punishment"); *State* v. *Thorp*, 2 P. 3d 903, 906 (Or. App. 2000) (*Harmelin* was "severely fractured"); *State* v. *Bonner*, 577 N. W. 2d 575, 579 (SD 1998) (regretting lack of majority opinion in *Harmelin*); *State* v. *Jones*, 543 S. E. 2d 541, 545, n. 11 (SC 2001) ("questionable" whether *Solem* test still mandatory after *Harmelin*); *State* v. *Harris*, 844 S. W. 2d 601, 602 (Tenn. 1992) (precise contours of the federal proportionality guarantee unclear); *State* v. *Bacon*, 702 A. 2d 116, 122, n. 7 (Vt. 1997) (*Harmelin* is a "fractured opinion" that casts doubt on *Solem*).

The Ninth Circuit's opinion in this case reflects the confused state of the law. It casually dismissed the California Court of Appeal's decision for failing to follow clearly established law because it questioned *Solem* in light of *Harmelin*. See *Andrade*, 270 F. 3d, at 766-767. This ignores both the conflicts within this Court's precedents, see *ante*, at 10-12, and the many state and federal opinions questioning *Solem* after *Harmelin*.

Some courts have gone so far as to claim that *Solem* was effectively overruled by *Harmelin*. Not long after *Harmelin* was decided, the Fifth Circuit stated that "disproportionality survives; *Solem* does not." *McGruder* v. *Puckett*, 954 F. 2d

313, 316 (CA5 1992); see also *Smallwood* v. *Scott*, 73 F. 3d 1343, 1346, n. 4 (CA5 1996) ("*Solem* was overruled to the extent that it found in the Eighth Amendment a guarantee of proportionality); *Edwards* v. *State*, 800 So. 2d 454, 469 (Miss. 2001) (*Solem* overruled to the extent that it guaranteed proportionality"). Others have been more circumspect, concluding, as the California Court of Appeal did, that *Solem* was called into question by *Harmelin*. See, *e.g.*, *Sarbello*, 985 F. 2d, at 723; *United States* v. *Kratsas*, 45 F. 3d 63, 66 (CA4 1995) ("cast some doubt"); *McCollough*, 967 F. 2d, at 535 (viability of *Solem* called into doubt); *Brown*, 825 P. 2d, at 491-492 ("seriously erodes"); *State* v. *Lara*, 580 N. W. 2d 783, 785 (Iowa 1998) ("called into question"); *State* v. *Scott*, 961 P. 2d 667, 672 (Kan. 1998) ("discredited"); *State* v. *Lindsey*, 770 So. 2d 339, 344, n. 2 (La. 2000) ("called into question"); *State* v. *Riley*, 497 N. W. 2d 23, 26 (Neb. 1993) ("extremely doubtful" precedent). Finally, another group of courts found that *Solem* has been limited by *Harmelin*. See, *e.g.*, *United States* v. *Bucuvalas*, 970 F. 2d 937, 946 n. 15 (CA1 1992) ("significant curtailment"), overruled on other grounds in *Cleveland* v. *United States*, 531 U. S. 1218 (2000); *Hawkins*, 200 F. 3d, at 1282 ("narrows *Solem*"); *People* v. *Cooper*, 43 Cal. App. 4th 815, 820, 51 Cal. Rptr. 2d 106, 108 (1996) ("weakened substantially"); *People* v. *Hindson*, 703 N. E. 2d 956, 965 (Ill. App. 1998) ("narrowed"); *State* v. *Lee*, 841 S. W. 2d 648, 654 (Mo. 1992) ("altered"). When the California appellate court questioned *Solem*, it had plenty of company.

This is relevant to the "clearly established federal law" inquiry under § 2254(d). Although the source of clearly established law is restricted to this Court's decisions, *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), the fact that the lower courts have difficulty in deriving a clear rule from this Court's precedents is relevant to determining whether the purported rule is clearly established. See *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994) (conflicting, reasonable views of lower courts precluded "old-rule" status under *Teague*); *Williams*, *supra*, at 412 (equivalence of *Teague* "old rule" with AEDPA "clearly

established"). If questioning *Solem* in light of *Harmelin* constitutes a failure to apply established Supreme Court precedent, then why have so many other courts followed the same path?

> A state court decision is:
>
> " 'contrary to' our clearly established precedent if the state court either 'applies a rule that contradicts the governing law set forth in our cases,' or 'confronts a set of facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from our precedent.' " *Penry* v. *Johnson*, 532 U. S. 782, 792 (2001) (quoting *Williams*, 529 U. S., at 405-406).

This is a matter of rule selection. Because this Court's precedents are not always clear or consistent, see, *e.g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 996-997 (1991) (opinion of Kennedy, J.); *Thompson* v. *Keohane*, 516 U. S. 99, 111 (1995), it may not be easy to discern the governing law from this Court's cases. While confusion in the lower federal and state courts is not dispositive, it is a symptom of an unclear or conflicted body of law, *i.e.*, not "clearly established."

If this Court could not agree on the proper standard for assessing proportionality challenges to prison sentences in *Harmelin*, then there can be very little "clearly established federal law" in this field. At most, appellate courts presented with proportionality attacks on prison sentences should compare the severity of the sentence to the magnitude of the crime and the defendant's criminal history to determine whether there is an inference of gross disproportionality. This determination is made with "utmost deference to the Legislature and the sentencing court." See *Bonner*, 577 N. W. 2d, at 580. If an inference of gross disproportionality is found, only then may the reviewing court turn to other objective factors. These may or may not include the *Solem* factors, or other factors not yet identified by this Court.

What is not clearly established is any particular method for comparing punishment and culpability. Because the conflict between *Rummel* and *Solem* is unresolved, neither of these different approaches can be said to clearly govern proportionality claims. While Justice Kennedy's *Harmelin* opinion provides some guidance, the life without possibility of parole sentence for a drug conviction gives *Harmelin* little relevance to Andrade's lesser sentence under a recidivism statute. Since each defendant is unique, and it is difficult to draw a line separating discrete prison sentences, see *Rummel*, 445 U. S., at 275, it may be impossible to give more concrete guidance. So long as a state court compares the culpability of the defendant's crime and criminal history to the severity of the sentence, then its decision is not contrary to any principle of federal law which has been clearly established by this Court up to this time.

The California Court of Appeal applied an independent state constitutional standard to the defendant's disproportionality claim that was almost identical to *Solem*'s three-part test.

> "A tripartite test has been established to determine whether a penalty offends the prohibition against cruel and unusual punishment. First, courts examine the nature of the offense and the offender, with particular regard to the degree of danger both present to society. Second a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions." App. to Pet. for Cert. 77 (internal quotations omitted); accord *People* v. *King*, 16 Cal. App. 4th 567, 571, 20 Cal. Rptr. 2d 220, 222 (1993); *In re Lynch*, 8 Cal. 3d 410, 425-427, 503 P. 2d 921, 930-932 (1972).

Since this standard is as favorable to the defendant as any articulated by this Court, including *Solem*, the California court did not choose the incorrect rule. Andrade's case is not "materially indistinguishable" from *Solem*. His sentence is less severe than Helm's and his culpability is greater. Therefore, the

California court at least identified and applied the proper rule. This was not a rogue state court ignoring clearly established precedent. Instead, when confronted with a confusing body of law, it applied a state constitutional standard more generous than the defendant was entitled to under this Court's cases. The state court's decision cannot be said to be "contrary to clearly established Federal law" as that phrase is interpreted in *Williams*.

III. The California court's application of what little clearly established law there is in this area was reasonable.

The Ninth Circuit's analysis of the reasonable application prong under 28 U. S. C. § 2254(d) suffers from several flaws. Its misidentification of *Solem* v. *Helm*, 463 U. S. 277 (1983) as the controlling precedent to the near exclusion of the other precedents, see *ante*, at 17, distorts its analysis of whether the California court's decision was reasonable. Also, the federal court did not properly defer to California's determination that this was the appropriate sentence for Andrade. Most importantly, the Ninth Circuit applied the wrong standard for analyzing whether a state court decision reasonably applies this Court's precedents.

The problem with the Ninth Circuit's approach to the reasonable application prong begins with the standard it applied to this test. There is no detailed test to determine when a state court's application of Supreme Court precedent is objectively unreasonable. In the cases addressing this issue, this Court simply analyzed the state court opinion and the relevant Supreme Court precedents and concluded that the state decision was either unreasonable, see *Williams* v. *Taylor*, 529 U. S. 362, 397 (2000); *Penry* v. *Johnson*, 532 U. S. 782, 803-804 (2001) (Fifth Amendment claim), or reasonable. See *id.*, at 795 (Eighth Amendment claim). *Bell* v. *Cone*, 535 U. S. __ (No. 01-400, May 28, 2002) (slip op., at 15-16). Other than informing the courts that unreasonableness must be determined objectively, and is more than mere error, see *Williams*, *supra*, at 410, this Court has given the lower federal courts little guidance in this admittedly difficult area. See *ibid.* As a consequence, the circuits have adopted their own tests for determining the reasonableness of a state court's decision. The Ninth Circuit's is far afield.

The Ninth Circuit standard for reasonableness under § 2254(d) is "clear error." Under this standard, a court first determines whether the state court decision was correct under its own interpretation of Supreme Court precedent. If it disagrees with the state court decision, it next determines whether this "error" is "clear error." "Clear error" is defined as "where the Court of Appeals is left with a 'definite and firm conviction' that an error has been committed." *Van Tran* v. *Lindsey*, 212 F. 3d 1143, 1153 (CA9 2000). If the error is labeled "clear," then the state court decision is deemed unreasonable under § 2254(d). See *id.*, at 1153-1154.

Focusing on the purported state court error starts the analysis on the wrong foot. Congress did not equate the unreasonable application standard with state court "error." See *Williams*, 529 U. S., at 410. Focusing on state court error backs away from the deference accorded to state courts under § 2254(d). It does not consider that in cases of disagreement with the lower federal courts, the state courts are very often correct and the federal courts are the ones in error. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 942 (1998). The Ninth Circuit's "approach . . . focuses on how sure the habeas court is that the state court has committed error, not whether the state court decision reveals an increment of wrongness beyond error." *Francis S.* v. *Stone*, 221 F. 3d 100, 110 (CA2 2000). The clear error standard also deflects the habeas court from addressing the AEDPA issue first. See *Bell* v. *Jarvis*, 236 F. 3d 149, 162, n. 9 (CA4 2000). This Court should provide further

guidance on how to determine when a state court decision is unreasonable.

Courts use tests in other contexts to determine whether an act is reasonable. The Fourth Amendment proscribes "unreasonable searches and seizures . . . ." U. S. Const., Amdt. 4. This Court guides efforts to assess whether a search or seizure is reasonable through a host of tests and standards. The reasonable suspicion standard helps courts and officers determine when a stop and frisk is reasonable. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Reasonableness can be detached from the Fourth Amendment's warrant requirement when the search is deemed reasonable after balancing society's interest in the search against the individuals' privacy interests. See *Vernonia School Dist. No. 47J* v. *Acton*, 515 U. S. 646, 664-665 (1995). Giving the federal courts more tools to determine when a state court decision is reasonable is consistent with the letter and the spirit of § 2254(d).

A proper standard for reasonableness must reflect the fact that genuinely unreasonable state court decisions are rare. State courts are quite willing and capable of enforcing the criminal defendant's constitutional protections, see *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976); the AEDPA is a recognition of this fact. If federal habeas courts commonly find "unreasonable" state decisions, then AEDPA's deference to state convictions evaporates.

As in *Williams*, this Court can look to the circuit courts for a standard to apply to § 2254(d). See *Williams*, 529 U. S., at 405 (partially adopting *Green* v. *French*, 143 F. 3d 865 (CA4 1998)). In *O'Brien* v. *Dubois*, 145 F. 3d 16 (CA1 1998), the First Circuit devised a useful standard for resolving reasonable application claims. "[F]or the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Id.*, at 25. Another formulation of this standard comes from the Seventh Circuit. "The statutory 'unreasonableness' standard allows the

state court's conclusion to stand if it is one of several equally plausible outcomes . . . . Some decisions will be at such tension with governing U. S. Supreme Court precedents, or so inadequately supported by the record or so arbitrary, that a writ must issue." *Hall* v. *Washington*, 106 F. 3d 742, 748-749 (CA7 1997). This standard is not foreign to this Court's analysis. It has relied on the term "plausible" in a similar context. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 819 (1988) (decision of coordinate court to transfer jurisdiction upheld under law-of-the case if "plausible"). Scheidegger, *supra*, 98 Colum. L. Rev., at 914-915 (discussing *Christianson*, *supra*).

Instead of examining the state court decision for error, habeas courts should see whether the decision is plausible. This is more than exchanging adjectives. "Plausible" is defined as "seemingly or apparently valid, likely or acceptable, credible . . . ." American Heritage Dictionary 1388 (3d ed. 1992). This shifts the inquiry away from whether the state decision was wrong to whether there are reasons that it could be right. If a reason for the decision can be found, it is not unreasonable. Federal courts applying § 2254(d) should first look for the positive in state court opinions before examining them for error.

Kibbe v. *Dubois*, 269 F. 3d 26 (CA1 2001) illustrates these principles. Kibbe was convicted in a Massachusetts court for arson of a building. *Id.*, at 28. The defendant ran from the police as they approached the crime scene. Once he was caught and read his *Miranda* rights, the defendant did talk to the police. See *id.*, at 28-29. At trial he testified that he ran because he was on parole, but he had not given this explanation to the police. See *id.*, at 29. Defense counsel commented in the opening and closing arguments that Kibbe voluntarily told the police what he was doing. See *ibid.* The prosecution argued at closing that Kibbe's failure to mention his reason for running from the police damaged his credibility, and that guilt should be inferred from flight. See *ibid.* The District Court found that this violated *Doyle* v. *Ohio*, 426 U. S. 610, 617-619 (1976) and

the state court opinion was contrary to *Doyle*. See *Kibbe*, *supra*, at 31. It also found that this was an unreasonable application of *Doyle*, but declined to develop that holding. See *id.*, at 32, n. 4. As an alternative holding, the District Court held that the state court had unreasonably applied the rule of *Anderson* v. *Charles*, 447 U. S. 404 (1980) to conclude that the defendant had waived his right to silence in its entirety, thus distinguishing *Doyle*. See *Kibbe*, *supra*, at 31. The District Court surveyed the treatment of similar cases in the federal circuits to come to the conclusion that "I am firmly convinced that error occurred and that the *Kibbe* decision is an unreasonable outcome." *Id.*, at 33.

After finding that the state court decision was not contrary to clearly established law, see *id.*, at 35-36, the Circuit Court turned to the unreasonable application standard. Applying the First Circuit's "plausible, credible outcomes" standard, the Circuit Court noted that the case fell outside the *Doyle* and *Charles* decisions. See *id.*, at 37. The fact that the issue was unresolved increases the chance "that there are other reasonable, yet contradictory, interpretations of Supreme Court precedent." *Ibid.* The state court's interpretation of *Doyle* and *Charles* was one alternative to the District Court's. See *ibid.* The First Circuit found that the state court's interpretation of *Charles* was credible, that "a court could plausibly argue that this holding should be extended to cover the facts of *Kibbe*'s case." *Id.*, at 38. This conclusion was supported by similar results in federal appellate decisions. See *id.*, at 38-39. However, it was not necessary for these precedents to point out the correct path of the law. "Furthermore, given its limited scope of review under the AEDPA, a federal habeas court ought not to provide the definitive answer to this open question." *Id.*, at 39. The state court decision did not have to be right, it only had to "rest[ ] upon a plausible interpretation of Supreme Court precedent . . . ." *Ibid.*

This approach addresses Andrade's claim much more accurately and economically than the Ninth Circuit's. Because

the state of the relevant Eighth Amendment precedents is so confused, contradictory but still reasonable alternative interpretations of this Court's cases are likely. The California court's opinion is a plausible interpretation of what authority can be drawn from *Harmelin*, *Solem* v. *Helm*, 463 U. S. 277 (1983), *Rummel* v. *Estelle*, 445 U. S. 263 (1980), and *Hutto* v. *Davis*, 454 U. S. 370 (1982).

This case is outside the facts of all four decisions. *Harmelin* and *Hutto* involved drug crimes, not recidivist schemes. *Solem*, in addition to being diminished by *Harmelin*, involved a harsher sentence. While Andrade's sentence is long, it is still less than the sentence of life without the possibility of parole in *Solem*. More importantly, Andrade's 40-year minimum is the result of two convictions with consecutive sentences, not the single conviction at issue in *Harmelin*, *Solem*, *Hutto*, and *Rummel*. "It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if the punishment for each were inflicted on him, he might be kept in prison for life." *State* v. *Four Jugs of Intoxicating Liquors*, 2 Atl. 586, 593 (Vt. 1886). Finally, Andrade's prior residential burglaries were more serious than Helm's third-degree burglaries. Residential burglary is more than a simple property crime. The federal sentencing guidelines require markedly enhanced sentences for offenders who have been convicted in federal courts for "a crime of violence" or "controlled substance offense" and have two or more prior convictions of such offenses. See U. S. Sentencing Guidelines § 4B1.1(1). Among the listed violent crimes is residential burglary. See *id.*, at § 4B1.2. As one federal judge has noted, "these subsections establish that an offense is a 'crime of violence' if injury occurs, is threatened, is attempted, or is likely." *United States* v. *Rutherford*, 54 F. 3d 370, 378 (CA7 1995) (Easterbrook, J., concurring). Since *Solem* has been diminished, and Andrade's criminal history is more severe than Helm's, it was plausible for the state court to distinguish *Solem*.

The California Court of Appeal's duty was to apply in a reasonable manner the principles of deference and objectivity from Justice Kennedy's opinion in *Harmelin*. The decision to not impose its own sentencing philosophy in place of that of the electorate and the sentencing judge[3] is consistent with the deference principle. Given the unsettled state of the law in this area, Andrade's more serious criminal history compared to any of the four defendants in the relevant Supreme Court authorities, and the fact that he was convicted of two separate felonies, the California appellate court's weighing of culpability and severity of punishment is plausible.

IV. If this Court subsequently invalidates part of California's three strikes scheme, the defendant can obtain relief in the California courts even if his claim is rejected in the present case.

The AEDPA should foreclose any holding on the merits of Andrade's Eighth Amendment claim. The Eighth Amendment status of California's three strikes law will be addressed on the merits in the separate case of *Ewing* v. *California*, No. 01-6978. For the reasons CJLF intends to brief in that case, the state should prevail on the straight merits. However, we will also address here the contingency of a change in the law wrought by *Ewing*.

If this Court decides that the statute is unconstitutional as applied in *Ewing*, the rejection of Andrade's federal habeas claim will not prevent him from obtaining reiief in the California courts. California allows successive habeas petitions for claims "based on a change in the law which is retroactively

3. Three strikes sentences are not truly mandatory. The sentencing judge has discretion to "strike" prior convictions in the interests of justice. See Cal. Penal Code § 1385; *People* v. *Superior Court (Romero)*, 13 Cal. 4th 497, 529-530, 917 P. 2d 628, 647 (1996); *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P. 2d 429, 437 (1998) (describing discretion).

applicable to final judgments." *People* v. *Clark*, 5 Cal. 4th 750, 775, 855 P. 2d 729, 745 (1993). Given the unsettled state of the Eighth Amendment in this area, any decision favoring *Ewing* would be a new rule. A decision in Ewing's favor would be retroactive on federal habeas under the first prong of *Teague* v. *Lane*, 489 U. S. 288 (1989) as it would prohibit a type of punishment for a class of defendant because of their status or offense. See *Penry* v. *Lynaugh*, 492 U. S. 302, 329-330 (1989). California's rule on retroactivity is even more generous. A habeas petition may raise an issue previously rejected on appeal "when there has been a change in law affecting the petitioner." *In re Harris*, 5 Cal. 4th 813, 841, 855 P. 2d 391, 407 (1993). If this Court decides in Ewing's favor, proper use of the AEDPA in the present case will not keep Andrade from getting any deserved relief in the California courts.

Federal habeas relief may not be granted if state remedies are not exhausted. See 28 U. S. C. § 2254(b). Exhaustion is determined in the present tense. The fact that an unexhausted remedy existed in the past does not preclude exhaustion if that remedy is no longer available. *Coleman* v. *Thompson*, 501 U. S. 722, 732 (1991). Conversely, the fact that the state courts did not offer a remedy at one point does not satisfy exhaustion if they offer one now.

In *Gusik* v. *Schilder*, 340 U. S. 128 (1950), Gusik was convicted of murder in a court-martial, and attacked the conviction through a habeas petition in federal District Court. See *id.*, at 129. The Court of Appeals reversed the District Court's grant of relief, holding that Gusik first had to exhaust a newly created administrative remedy. See *id.*, at 129-130. Therefore it dismissed the petition without prejudice to file a new petition after exhausting the administrative remedy. See *id.*, at 130. This Court held that instead of dismissing the petition, the Court of Appeals should have "held the case pending resort to the new remedy . . . ." *Id.*, at 133. If Gusik obtains administrative relief then the petition is dismissed, if he is unsuccessful it is reinstated, avoiding the cost of relitigation

See *id.*, at 133-134. While it disposed of the case differently, this Court still agreed with the main point of the Court of Appeal that the new remedy must be exhausted before being addressed in a federal habeas petition.

If this Court rules in favor of Ewing, Andrade's case should be treated similarly. The federal courts should either dismiss or withhold judgment on his claim until it is exhausted in the California courts. The dismissal rule is more strict now than it was at the time of *Gusik*. See *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). A remand petition following exhaustion is not "successive." *Slack* v. *McDaniel*, 529 U. S. 473, 478 (2000). The statute of limitations "clock" resets upon announcement of the retroactive new rule. 28 U. S. C. § 2244(d)(1)(c). California's liberal approach to retroactivity on habeas corpus guarantees that Andrade would have his day in state court, and federal review would remain available in the highly unlikely event that California's courts fail to reasonably apply whatever new rule may be created in *Ewing*.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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